No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

MONY PREAP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ADMINISTRATIVE AND IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
(Counsel of Record)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

QUESTION PRESENTED

Whether Section 1226(c) imposes mandatory detention, without an individualized hearing on flight risk and danger, even when the Department of Homeland Security does not promptly detain an individual when she is released from criminal custody.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT HAS NEVER APPLIED *CHEVRON* IN IMMIGRATION DETENTION CASES 6

II. THERE ARE STRONG REASONS NOT TO APPLY *CHEVRON* DEFERENCE WHEN INTERPRETING THE INA'S DETENTION PROVISIONS 8

A. The Scope Of *Chevron* Deference Is Not Unlimited 8

B. The Parallels Between Immigration Detention And Criminal Law Counsel Against Application Of The *Chevron* Framework To Questions Concerning Detention Authority 11

C. *Chevron* Deference Is Incompatible With Courts' Traditional Exercise Of Habeas Review As A Check On Executive Detention Power 17

CONCLUSION 22

APPENDIX: List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abramski v. United States,
134 S. Ct. 2259 (2014) 12

Bolling v. Sharpe,
347 U.S. 497 (1954) 3

Boumediene v. Bush,
553 U.S. 723 (2008) 18, 19

Bridges v. Wixon,
326 U.S. 135 (1945) 14

Carachuri-Rosendo v. Holder,
560 U.S. 563 (2010) 7

Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 1, 2

Christensen v. Harris Cnty.,
529 U.S. 576 (2000) 9

City of Arlington, Tex. v. F.C.C.,
569 U.S. 290 (2013) 9, 10

Clark v. Martinez,
543 U.S. 371 (2005) 7, 20

Crandon v. United States,
494 U.S. 152 (1990) 12, 13, 15

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Demore v. Kim,
538 U.S. 510 (2003) 7

Esquivel-Quintana v. Lynch,
810 F.3d 1019 (6th Cir. 2016) 11, 13

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 7, 11

Fong Haw Tan v. Phelan,
333 U.S. 6 (1948) 14

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 15

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 7

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 8, 9, 13

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 6

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 16

INS v. Elias-Zacarias,
502 U.S. 478 (1992) 6

INS v. St. Cyr,
533 U.S. 289 (2001) 16, 19

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Leocal v. Ashcroft,
543 U.S. 1 (2004) 7

Lopez v. Gonzales,
549 U.S. 47 (2006) 7

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 8

Matter of Garcia-Arreola,
25 I. & N. Dec. 267 (BIA 2010) 16

Matter of Saysana,
24 I. & N. Dec. 602 (BIA 2008) 16

Mellouli v. Lynch,
135 S. Ct. 1980 (2015) 7

Moncrieffe v. Holder,
569 U.S. 184 (2013) 7

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 17

Nijhawan v. Holder,
557 U.S. 29 (2009) 7

Padilla v. Kentucky,
559 U.S. 356 (2010) 14

Pereira v. Sessions,
138 S. Ct. 2105 (2018) 4

Rasul v. Bush,
542 U.S. 466 (2004) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Scialabba v. Cuellar de Osorio,
134 S. Ct. 2191 (2014) 6

Torres v. Lynch,
136 S. Ct. 1619 (2016) 7

United States v. Apel,
571 U.S. 359 (2014) 12

United States v. Mead Corp.,
533 U.S. 218 (2001) 9

Zadvydas v. Davis,
533 U.S. 678 (2001) ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 9, cl. 2 18

OTHER AUTHORITIES

Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 NYU L. Rev. 143 (Apr. 2015) ..... *passim*

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*,
1989 Duke L.J. 511 (June 1989) 8

Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059 (2011) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (Apr. 2006) 11

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 17

David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002) 15

David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169 (May 2010) 10

Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1 (2006) 16

Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833 (Dec. 2011) 2

Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363 (Feb. 2014) 2

Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 Geo Immigr. L.J. 99 (2017) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 Brook L. Rev. 1241 (2011) 5

Michael Kagan, Chevron's *Liberty Exception*, 104 Iowa L. Rev. (Forthcoming 2019) ..... *passim*

Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 Drexel L. Rev. 323 (2017) 5

Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 Geo. Immigr. L.J. 313 (2012) 5

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 10

Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153 (2004) 18

Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (Apr. 2001) 11

Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014) 11

INTEREST OF *AMICI CURIAE*

Amici are seven professors whose expertise and scholarship addresses the applicability of deference principles in immigration law.[1] *Amici* have produced substantial scholarship on immigration law, administrative law, and constitutional law, including scholarship that has been cited by this Court and others in immigration cases.

Amici submit this brief to address the government's argument that the Court should defer to the Board of Immigration Appeals' ("BIA") interpretation of 8 U.S.C. § 1226(c), which implicates the scope of the executive's detention authority, under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Petr. Br. 39. In *amici*'s view, the premise of that argument—that *Chevron* applies in the immigration detention context—is misguided. *Amici* have written about and have a substantial interest in the proper development of administrative law generally and of *Chevron* in particular in the immigration context, and they respectfully submit this brief to explain why the *Chevron* framework has no application here.

A full list of *amici* is attached as an appendix to this brief.

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed concurrently herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mandatory detention in the immigration context is exceptional. "It has little basis in history and few parallels in the preventative detention context." Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 NYU L. Rev. 143, 144 (Apr. 2015). Mandatory detention "strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate." Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 367 (Feb. 2014). The mandatory detention regime has "led to a massive increase in civil immigration detention in the United States," with hundreds of thousands of non-citizens detained each year. *Id.* at 365. When subjected to mandatory detention, non-citizens "may be deprived of their liberty in jails or prisons for days, months, or even years as they defend themselves in removal proceedings." Das at 145; *see* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 Colum. L. Rev. 1833, 1843-44 (Dec. 2011).

In this case and others reviewing the propriety of immigration detention through habeas petitions, the lower courts have frequently applied *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which courts defer to an

agency's reasonable interpretation of an ambiguous statute. But these courts have not critically examined whether the *Chevron* framework applies in this context in the first place. There are strong reasons to conclude that it does not.

Indeed, unlike the lower courts, this Court has never applied *Chevron* when confronted with statutory questions concerning immigration detention—even though the Court has applied *Chevron* to other immigration-related issues, such as visa eligibility and discretionary relief from removal. The academic literature examining whether and how *Chevron* applies to immigration law provides important insights into why the Court is correct to have avoided *Chevron* in the detention context and why it should continue to do so.

As this Court's cases recognize and the scholarship reiterates, *Chevron* deference does not apply in all circumstances. Before the Court will apply *Chevron*, it must first inquire into whether Congress has delegated to the executive authority to interpret the statutory provision in question—and whether there are factors that would nonetheless preclude deference, such as a particularly strong need to preserve a robust role for the courts as a check on executive power. The physical liberty interests involved in the immigration detention context call for strong checks and balances, pushing against deference in this sphere.

Immigration detention closely resembles criminal punishment in that it implicates a primary concern of the Due Process Clause: the "freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497,

499 (1954). The Court has long declined to defer to the executive on questions of criminal law where such individual liberty interests are at stake, and even though immigration detention is preventative, rather than punitive, in nature, the rationale underlying that rule applies equally to immigration detention issues like that presented in this case.

In addition, permitting the executive not only to administer detention statutes, but also to define the scope of its own detention authority, raises serious separation of powers concerns. The Constitution assigns the detention power exclusively to Congress. And the judiciary historically has operated as an important check on executive detention through exercise of the writ of habeas corpus—a role that would be seriously compromised if courts were to afford "reflexive deference" to the executive's interpretation of detention provisions. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

In sum, the paramount physical liberty interests at stake, coupled with the courts' crucial separation-of-powers function in this area, counsel against judicial deference to the executive branch on questions of mandatory detention. The Court should not defer to the BIA's construction of 8 U.S.C. § 1226(c).

ARGUMENT

In recent years, courts and commentators have shown a strong interest in examining *Chevron*'s scope—and in exploring its limits.

Within this broader debate, a number of scholars, including *amici*, have questioned whether *Chevron* deference is appropriate in a variety of immigra-

tion law contexts. *See, e.g.*, Das, *supra* (arguing that courts should reject application of *Chevron* when exercising habeas review in statutory immigration detention cases); Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 Drexel L. Rev. 323, 331 (2017) (arguing for "an expansive principle of nondeference when courts settle interpretive ambiguity in crime-based removal statutes"); Michael Kagan, Chevron*'s Liberty Exception*, 104 Iowa L. Rev. (Forthcoming 2019), *available at* https://ssrn.com/abstract=3125736 (arguing that "*Chevron* deference is inappropriate when courts review the legality of a government intrusion on physical liberty," as in deportation and detention); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059 (2011) (arguing against *Chevron* deference in the area of asylum and refugee law); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 Brook L. Rev. 1241 (2011) (arguing against deference to Attorney General's decision about how to determine whether a crime involves moral turpitude); Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 Geo. Immigr. L.J. 313 (2012) (arguing against deference to the BIA in light of the BIA's flawed decisionmaking process and apparent bias).

This body of scholarship highlights the wide range of issues that fall under the general umbrella of "immigration law," and it touches on many issues that reach well beyond the question presented in this case. But the scholarship also reflects several

themes of particular relevance here. As the scholarship confirms, there are strong reasons not to apply the *Chevron* framework to questions of immigration detention, and especially to questions about the scope of the mandatory detention power.

I. THIS COURT HAS NEVER APPLIED *CHEVRON* IN IMMIGRATION DETENTION CASES

Although the Court on occasion has applied *Chevron* in immigration cases, *see, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the Court in other instances has declined to do so, *see, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

This variation in the Court's approach is not random. As Michael Kagan has pointed out, the Court's "practice with regard to *Chevron* in immigration cases follows a discernable pattern." Kagan at 5. The Court has applied *Chevron* deference in cases involving immigration benefits such as visa eligibility and discretionary relief from removal, but the Court has *not* deferred to the executive in cases involving deportation or detention. *See* Kagan at 5, 47, 52-53; *see also* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 Geo Immigr. L.J. 99, 116 (2017) (arguing that although "*Chevron* deference is operative in immigration law," "[t]he question of when *Chevron* deference applies [in the immigration context] has even more layers of complexity than in other areas of administrative law").

In at least seven decisions concerning the BIA's interpretation of criminal grounds of removal, the Court did not discuss or reference *Chevron*,[2] and in two others the Court mentioned *Chevron* but did not actually defer.[3] And, of particular importance here, the Court has never mentioned, much less applied, *Chevron* deference in a case related to detention. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Demore v. Kim*, 538 U.S. 510 (2003); *Clark v. Martinez*, 543 U.S. 371 (2005); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Just last Term, in a case involving interpretation of the same statute at issue here, the government argued that its interpretation "warrant[ed] full deference under *Chevron*." Brief for Petitioners at 18, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). The Court declined to afford the executive's interpretation *Chevron* deference, and, in fact, the Court's decision says nothing about the *Chevron* doctrine at all.

This pattern may explain why the government cites only three cases to support its assertion that *Chevron* deference is warranted in this case, *see*

---

[2] *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

[3] *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, ... is owed no deference under the doctrine described in *Chevron*.").

Petr. Br. 39, each of which is materially distinguishable, as none involves detention. Even if *Chevron* properly applies to some immigration law issues (a premise that is itself subject to debate, *see, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring)), it does not follow that *Chevron* necessarily applies to each and every issue that can be described as involving immigration law. *See* Kagan at 5 ("It is important to differentiate the specific issues raised in different types of immigration cases.").

II. THERE ARE STRONG REASONS NOT TO APPLY *CHEVRON* DEFERENCE WHEN INTERPRETING THE INA'S DETENTION PROVISIONS

The Court has not yet explained its varied approach to agency deference in immigration cases. But the scholarly literature highlights several key principles that strongly support the Court's practice of not deferring to the executive in the detention context.

A. The Scope Of *Chevron* Deference Is Not Unlimited

There is an inherent tension in judicial deference to the executive. "[O]n its face" the concept of such deference "seems quite incompatible with Marshall's aphorism that 'it is emphatically the province and duty of the judicial department to say what the law is.'" Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 513 (June 1989) (brackets omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

(1803)); *see also Gutierrez-Brizuela*, 834 F.3d at 1151-52 (Gorsuch, J., concurring). Although *Chevron* has become widely accepted in at least some contexts, this passage serves as an important reminder that courts start from a baseline of non-deference: "Put another way, courts should give the authoritative interpretation of the law, unless there is good reason to do otherwise." Kagan at 12.

Ordinarily, to determine whether *Chevron* applies, the Court asks whether Congress has delegated to the agency authority to act with the force of law with respect to the question in controversy. *See, e.g., City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306 (2013); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (where there is doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). The Court has recognized that "a very good indicator of delegation meriting *Chevron* treatment" is an "express congressional authorization[] to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). In some cases, courts have held that a general delegation of interpretive authority is enough "to decide that *Chevron* applies and that Congress intended for the agency to fill the ensuing gaps in the statute." Das at 178. But there is reason to be cautious in trying to discern delegation. *See Gutierrez-Brizuela*, 834 F.3d at 1154-55 (Gorsuch, J., concurring).

Even under a delegation framework, "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap." *City of Arlington*, 569 U.S. at 308-09 (Breyer, J., concurring in part and concurring in judgment). As Justice Breyer has explained, the Court's cases "make clear that other, sometimes context-specific, factors will on occasion prove relevant." *Id.* at 308-09; *see* Kagan at 16-17 (discussing context-specific approach to *Chevron*). For example, the subject matter of the relevant provision—"its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority"—is often pertinent to the inquiry. *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring in part and concurring in judgment); *see also* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169, 2220-21 (May 2010) (arguing that "administrative control should be tailored to administrative action").

These contextual factors can indicate that Congress did not intend—or perhaps *could not* intend—to delegate interpretive authority to an executive agency. *See* Das at 173 (describing "two-sided question regarding both delegation and nondelegation"). Courts therefore must examine whether there are factors that would push *against* delegation, "such as the need for checks and balances or the doctrines that might suggest a more robust role for federal courts in exercising review." *Id.*; *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 363 (1986) (discussing

conflicting themes within the debate over the administrative state: "the need for regulation" versus "the need for checks and controls").

Inherent in this type of context-specific approach, and in what scholars have termed *Chevron*'s "step zero," is the notion that deference has limits—and that there are areas of the law where, whatever Congress might have intended, *Chevron* is simply inapplicable. Kagan at 17; *see also, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (Apr. 2001); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 191 (Apr. 2006). Indeed, the Court has never "suggested that it would defer to agency views regarding the meaning of statutes that have traditionally been enforced by the courts, such as the criminal law or the antitrust laws." Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753, 760 (2014); *see also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (listing various circumstances in which the Court has recognized that *Chevron* deference "is categorically unavailable"), *rev'd*, 137 S. Ct. 1562 (2017).

B. The Parallels Between Immigration Detention And Criminal Law Counsel Against Application Of The *Chevron* Framework To Questions Concerning Detention Authority

Perhaps the clearest example of the limiting principles just discussed is the Court's consistent, longstanding refusal to apply *Chevron* in the criminal law context. That rule, and the reasoning under-

lying it, provides a strong foundation for rejecting *Chevron* in the immigration detention context as well.

1. It is beyond dispute that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). As Justice Scalia noted in his concurrence in *Crandon v. United States*, 494 U.S. 152 (1990), "a criminal statute[] is not administered by any agency but by the courts," and thus the judiciary does not defer to the executive's interpretations of criminal statutes. *Id.* at 177 (Scalia, J., concurring in the judgment). "The Justice Department, of course, has a very specific responsibility to determine for itself what [a criminal] statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.*; *see also Abramski*, 134 S. Ct. at 2274 ("Whether the Government interprets a criminal statute too broadly ... or too narrowly ... a court has an obligation to correct its error."); *United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

Underlying courts' refusal to apply *Chevron* when interpreting criminal statutes is the recognition that the interpretation of criminal provisions implicates two concerns of utmost constitutional importance: separation of powers and the deprivation of physical liberty. A contrary rule would lead to an impermissible consolidation of power over individual physical liberty:

> The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws. ... And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.

Esquivel-Quintana, 810 F.3d at 1027 (Sutton, J., concurring in part and dissenting in part) (citation omitted). And, as Justice Scalia observed, because the executive is incentivized to take "an erroneously broad view" of criminal statutes in order to preserve the possibility that the statute "may cover more than is entirely apparent," deference to the executive in the criminal context would "replac[e] the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 177-78 (Scalia, J., concurring in judgment),

2. The same separation of powers concerns and weighty individual liberty interests that preclude deference in the criminal law context are also present where immigration detention is concerned. *See Gutierrez-Brizuela*, 834 F.3d at 1149, 1156 (Gorsuch, J., concurring) (reasoning that the separation of powers concerns that preclude deference to the executive on questions of criminal law apply with equal force in other contexts, including at least some immigration issues); Kagan at 5 (arguing that the Court "should be willing to state clearly that deference on questions of law is inappropriate in this context for the same reasons why it is inappropriate in questions of criminal law").

To start, criminal law and immigration detention both involve a deprivation of individual liberty that requires robust, independent review by the courts.

The Court has long recognized that deportation, where the government expels a person from the United States, implicates physical liberty concerns that warrant particular care: Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," the Court "will not assume that Congress meant to trench on [a non-citizen's] freedom beyond that which is required by the narrowest of several possible meanings of [statutory language]." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *see Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty.'"); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling." (citations omitted)). Much like imprisonment, the deprivation of physical liberty involved in deportation "calls for strong checks and balances between the judiciary and the executive branches, which makes judicial deference to administrative interpretations of the law especially indefensible." Kagan at 49.

The argument against deference is, if anything, even stronger with detention than with deportation: Immigration detention is not *like* imprisonment, it *is*

imprisonment. And mandatory detention under 8 U.S.C. § 1226(c) is imprisonment without the opportunity to appear for a bond hearing. By its very nature, this form of detention involves an onerous deprivation of individual liberty that requires robust judicial review in order to effectuate due process.

Of course, criminal law is unique in the sense that it involves *punitive* detention, while civil immigration detention "is by definition 'preventative.'" David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1006-07 (2002); *see Fong Yue Ting v. United States*, 149 U.S. 698, 728-30 (1893). But that is a distinction without a difference for *Chevron* purposes. As David Cole has noted, it is "precisely because preventive detention involves depriving individuals of their physical liberty without an adjudication of criminal guilt" that "its use is strictly circumscribed by due process constraints." Cole at 1006-07. And punishment or not, freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. That core principle animates the Court's refusal to apply *Chevron* in the criminal law context, and it applies equally to immigration detention.

What is more, as with criminal law, the executive has strong incentives to interpret its own detention authority broadly so as to maximize its flexibility for future cases. *See* Das at 190 (the Department of Justice's interest in immigration detention "is no different than a criminal prosecutor: to 'err in the direction of inclusion rather than exclusion' and tak[e] a broad view of the scope of the statute" (quot-

ing *Crandon*, 494 U.S. at 177-78 (Scalia, J., concurring in judgment))). This theory is borne out in practice: The BIA has issued "scores of decisions expansively interpreting provisions of the mandatory immigration detention statute," such that thousands of non-citizens each year are subjected to mandatory detention without the possibility of release on bond. Das at 146.[4] Deference to the BIA's interpretation of the executive's detention authority, like deference to prosecutors' interpretation of criminal statutes, would accordingly "result in the application of an interpretive 'rule of severity.'" *Id.* at 189-90.

3. Immigration law also parallels criminal law in another relevant respect—in both contexts, courts apply a rule of lenity. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Although scholars have debated precisely how the rule of lenity interacts with *Chevron*, there is good reason to think "the rule of lenity should, where applicable, displace the *Chevron* framework entirely." Das at 200; *see* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 Baylor L. Rev. 1, 61 (2006) ("The protection of ... constitutional princi-

---

[4] For example, in other cases not at issue here, the BIA has interpreted various terms in 8 U.S.C. § 1226(c) to reach extremely broad populations of immigrants. *See, e.g.*, *Matter of Saysana*, 24 I. & N. Dec. 602, 605 (BIA 2008) (concluding that a release from criminal custody for any offense, even one that is not a basis for mandatory detention, may trigger mandatory detention); *Matter of Garcia-Arreola*, 25 I. & N. Dec. 267, 270 (BIA 2010) (overruling *Matter of Saysana* in light of widespread rejection in federal courts while insisting its prior interpretation was not contrary to the statute).

ples, a primary duty of the judiciary, must trump the rule of deference."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000) (explaining that lenity trumps *Chevron* because "[o]ne function of the lenity principle is to ensure against delegations"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (identifying the rule of lenity as a tool of construction a court might invoke to justify withholding *Chevron* deference). By instructing courts faced with an ambiguous statute to construe the statute against the government, the rule of lenity "obviates the need [for the court] to consider or defer to the agency's viewpoint." Das at 200. The "court never proceeds to *Chevron* step two, because the rule of lenity resolves any remaining ambiguities after other tools of statutory construction are applied" at step one. *Id.* Applied in this way, the rule of lenity "serve[s] its original purpose—to prevent harsh results in the face of ambiguities." *Id.*

C. *Chevron* Deference Is Incompatible With Courts' Traditional Exercise Of Habeas Review As A Check On Executive Detention Power

1. The rule that *Chevron* does not apply to criminal law is, at bottom, grounded in separation-of-powers principles—and, more specifically, the recognition that especially strong checks and balances are necessary where physical liberty interests are at stake.

Scholars have similarly recognized "a strong separation of powers rationale for why a federal court should prefer its own view over the [execu-

tive's] in interpreting detention authority." Das at 186; *see also* Kagan at 52 ("[T]he application of *Chevron* in habeas cases undermines the role the judiciary has traditionally played in reviewing deprivations of liberty."). The Constitution vests detention power exclusively with Congress, not the executive. *See* Stephen I. Vladeck, Note, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 157 (2004). Executive encroachment on this power violates "two of our most basic constitutional precepts: the proper separation of powers between the executive and the legislature, and the individual right not to be deprived of personal liberty without due process of law." *Id.* at 157-58. Although the executive may, of course, "administer detention statutes, a serious separation of powers issue arises when the executive may define the scope of detention power as well." Das at 186.

Courts, moreover, have historically played an important role in protecting the separation of powers through the exercise of habeas review. As this Court has observed, "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008); *see* U.S. Const. art. I, § 9, cl. 2. Habeas review "serves the twin purposes behind the Framers' choice to allocate power among three branches of government in the first place: to hold government accountable and to protect individual liberty." Das at 186; *see Boumediene*, 553 U.S. at 742 ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that al-

located powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.[5]

These two factors—"the allocation of detention power to Congress and the historical role of habeas courts in protecting against unlawful executive detention"—weigh heavily against judicial deference to the executive's interpretation of its own detention authority. Das at 187. "If one branch of government infringes a person's physical liberty ... she should have the right to go before a separate branch of government for an assessment of whether this action was justified under law." Kagan at 49.

2. Consistent with this view, the Court has refused to defer to the executive in the immigration detention context, expressing concerns about the tension between deference and the duty of habeas courts to review the lawfulness of executive detention.

---

[5] It is well established that Article III courts serve as an important check on executive detention for both citizens and non-citizens alike. *See, e.g., Boumediene*, 553 U.S. at 747 ("We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief."); *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (explaining that 28 U.S.C. § 2241 "draws no distinction between Americans and aliens held in federal custody").

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court rejected the government's argument that its interpretation of a provision authorizing detention for non-citizens who have a final order of deportation against them was entitled to deference. *Id.* at 682. The government argued that under the plenary power doctrine, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Brief for Respondents at 20, *Zadvydas v. Davis*, 533 U.S. 678 (2001). And in a subsequent case, the Court noted that *Zadvydas* involved "ambiguities in the statutory text," *Clark v. Martinez*, 543 U.S. 371, 378-79 (2005), which in many contexts would induce the Court to defer to the executive under *Chevron*. But the Court did not defer. The Court instead undertook its own searching review of the statutory scheme, *Zadvydas*, 533 U.S. at 695-700, noting that "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights,'" *id.* at 692. The Court recognized that judicial "review must take appropriate account" of factors like the "immigration-related expertise of the Executive Branch," but the Court believed that courts could do so "without abdicating their legal responsibility to review the lawfulness of an alien's continued detention." *Id.* at 700. The Court's decision suggests, in other words, that in these circumstances deferring to the executive would have been "antithetical to the core role of the habeas court." Das at 187.

Although *Zadvydas* could be read narrowly to apply only where there is a constitutional challenge to the executive's detention authority, *see Zadvydas*, 533 U.S. at 689, such an interpretation would "presume[] a false dichotomy: that some cases are about limitations on executive detention, while others are about the review of administrative immigration authority," Das at 148-49. "Any habeas challenge to the scope of an immigration detention statute—whether it focuses primarily on constitutional concerns or involves broader tools of statutory construction—ultimately requires review of the lawfulness of the executive's deprivation of an immigrant's physical liberty." *Id.* at 149. *Zadvydas* is thus better understood as recognizing that "there is something about the exercise of habeas corpus review over executive detention cases that creates, in and of itself, an exception to *Chevron* deference." *Id.* at 181.

* * *

The important liberty interests at stake, and the particular separation of powers concerns they raise, are incompatible with the notion of judicial deference to the executive on questions of detention authority. Such deference would present an especially poignant abdication of the judicial role given the statutory provision at issue here: Not only would the Court be deferring to the executive on who is subject to mandatory detention, it would be empowering the executive to define who is excluded from the opportunity to obtain a bond hearing—an important judicial check on executive power that Congress wrote into the statute. In these circumstances, it is the Court's

responsibility to decide for itself "what the law is," regardless of the executive's view.

CONCLUSION

For the foregoing reasons, the Court should not defer to the BIA's construction of 8 U.S.C. § 1226(c).

Respectfully submitted,

DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
(Counsel of Record)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, N.Y. 10036
(212) 326-2000

August 13, 2018

APPENDIX

AMICI CURIAE[1]

Gabriel J. Chin is the Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor at the University of California, Davis School of Law. He has published numerous articles on the intersection of criminal law, immigration law, and executive power.

Alina Das is a Professor of Clinical Law at New York University School of Law and Co-Director of the Immigrant Rights Clinic. Her scholarship focuses on deportation, detention, and the intersection of immigration and criminal law.

Jill E. Family is Commonwealth Professor of Law and Government at Widener University Commonwealth Law School and the Director of Widener's Law and Government Institute. Her scholarship draws on administrative and constitutional law to analyze the relationships among the three branches of government in setting, implementing, and interpreting immigration law.

Bassina Farbenblum is a Senior Lecturer at the University of New South Wales Law School, Director of the UNSW Human Rights Clinic, and Co-Director of the Migrant Worker Justice Initiative. She has written extensively on the rights of migrants, asylum seekers, and other non-citizens.

---

[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not necessarily reflect the views of the institutions with which *amici* are affiliated.

Michael Kagan is a Professor of Law at the University of Nevada, Las Vegas School of Law and Director of the UNLV Immigration Clinic. He is the author of numerous articles about immigration and asylum issues and how these issues interact with administrative law and executive power.

Shruti Rana is a Professor of International Law Practice and the Director of the International Law and Institutions Program at the School of Global and International Studies, Indiana University Bloomington. Her scholarship focuses on immigration and refugee law, and she has written numerous articles on the interaction between these issues and administrative law.

Rebecca Sharpless is a Professor of Clinical Legal Education and Director of the Immigration Clinic at the University of Miami School of Law. Her scholarship focuses on the intersection of immigration and criminal law and the role of the judicial branch as it relates to these issues.